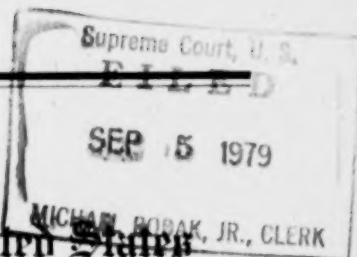

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979



No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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The Government, in its opposing brief, misstates crucial facts to bolster its argument that Supreme Court review is not warranted to examine the propriety of the lower court "finding" the jurisdictional facts necessary to sustain the order of the CPSC when the CPSC did not and could not make such findings on the agency record before it.

1. The Government argues (Res. Br. 5-6) in effect that petitioners are precluded from raising the jurisdictional issue before the Supreme Court because they did not raise it before the CPSC. A trade association composed of petitioners' commercial customers asked the CPSC to address this issue (JDA at 563-64).¹ Repeti-

¹ The Flat Glass Marketing Association, whose members wholesale, retail, and install wired glass purchased from petitioners,

tion would have served no useful purpose. Nevertheless, the Government never challenged the procedural posture of petitioners' argument at the Court of Appeals level, and that court accepted, considered, and discussed the argument in its opinion. 593 F.2d 1323, 1327-28 (Res. Br. App. A6-A8).

2. The Government implies (Res. Br. 4) petitioners can not complain about the ruling of the Court of Appeals on the jurisdictional findings question—whether the product is customarily sold or distributed to consumers²—because they neglected to request the opportunity to present additional evidence and argument to the Court pursuant to 15 U.S.C. § 2060(b). Additional argument and evidence were unnecessary. Petitioners' arguments on this issue were properly before the lower court; the record before the CPSC contained sufficient evidence to resolve the issue. The Court of Appeals ignored this record evidence, relying instead on a preliminary report that does not deal with the channels of distribution for wired glass.

3. The Government misrepresents (Res. Br. 7, n. 8) that the pivotal factual "finding" of the Court of Appeals rests on evidence derived from a study that specifically "surveyed" wired glass distribution. That so-called study is strictly a preliminary report. Its only mention of wired glass is a chart, labeled "Table 3," listing glass manufacturers "likely to produce flat glass products." A directory of glass manufacturers is stated as the source of this list. There is no hint of any survey conducted or even a suggestion wired glass is sold to consumers in any quantity through lumber yards, hardware and retail stores, or building materials dealers.

participated in the proceeding before the CPSC and raised several jurisdictional issues.

² The Court of Appeals ruled that its resolution of the jurisdictional issue hinged on this factual determination.

The only evidence of record on this point, contained in the *final* report prepared by the same outside firm, is to the contrary (JDA at 218-19). See Pet. Br. 5, n.8, and 11. The Court of Appeals not only ignored this conclusive evidence, but with respect to the non-supportive evidence it did cite, the Court had to indulge in factual assumptions presumably it would attribute to the CPSC and the agency record: (1) wired glass is included among the various types of glazing materials marketed through lumber yards, hardware and retail stores, and building materials dealers; (2) consumers in fact purchase wired glass from these sources of distribution; and (3) there is a "*significant marketing* of the product [through these sources] to consumers" (emphasis added) (see Pet. Br. App. A8). Nothing in the record supports any of these assumptions; each is patently false.

The inability of the Government to develop relevant arguments, bottomed on facts in the agency's record, to support the lower court's disposition of the jurisdictional dilemma only underscores the need for this Court to accord plenary review of the action below.

Respectfully submitted,

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